P.E.R.C. NO. 2002-5

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF UNION,

Petitioner,

-and- Docket No. SN-2001-43

UNION COUNTY CORRECTION
OFFICERS, P.B.A. LOCAL NO. 199,

Respondent.

SYNOPSIS

The Public Employment Relations Commission determines that a contract proposal that the Union County Correction Officers, P.B.A. Local No. 199 seeks to have included in a successor contract with the County of Union is not mandatorily negotiable. The Commission finds that, on its face, the proposal requires the County to provide light or modified duty for pregnant officers, even if light duty is not provided to other correction officers. A claim that the County's policy is discriminatory under the Americans With Disabilities Act, the Federal Pregnancy Anti-Discrimination Act, or the New Jersey Law Against Discrimination does not transform the decision to provide light duty into a mandatorily negotiable subject.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

For the Petitioner, Schenck, Price, Smith & King, LLP, attorneys (Kathryn V. Hatfield, on the brief)

For the Respondent, Loccke & Correia, P.A., attorneys (Michael A. Bukosky, on the brief)

DECISION

On February 27, 2001, the County of Union petitioned for a scope of negotiations determination. The County seeks a determination that a proposal made by Union County Correction Officers, P.B.A. Local No. 199 is not mandatorily negotiable and may not be considered by an interest arbitrator for inclusion in a successor collective negotiations agreement.

The parties have filed briefs and exhibits. These facts appear.

The PBA represents all non-supervisory correction officers. The parties' most recent collective negotiations agreement expired on December 31, 2000. The PBA has petitioned for interest arbitration.

Article 21 of the expired agreement is entitled Maternity Leave. Section 1 provides:

> Any pregnant employee who requests a maternity leave of absence shall be required to apply to the County Manager, in writing, for such leave. The request shall be made as soon as the employee has received medical proof that she is pregnant and the request shall contain the date when the employee desires the maternity leave to commence and a return date which shall not exceed ninety (90) days from the date of the delivery of the child, provided, however, the period shall be extended if medical proof is submitted to support the grant of an extension beyond ninety (90) days. The request for the leave shall be accompanied by a written medical statement that the date of the request to commence benefit leave of absence will not be harmful to the health or well being of the employee. In the event that a doctor, designated by the Employer, advises the Employer that the employee is incapable of continuing her duties, the Employer may then demand commencement of the leave at a time earlier than requested.

Section 2 concerns return to work and procedures for extending leaves. Section 3 deals with returning to work before the termination period of the leave. Section 4 states that any employee who fails to return to work at the end of the leave will be considered to have resigned. Section 5 states that no extensions of maternity leaves will be granted beyond 90 days absent medical proof, and Section 6 concerns maternity leaves for temporary employees.

PBA proposal no. 12 states:

> The PBA proposes a modification to Section 1 to provide for modified duty due to pregnancy of an employee. This inclusion is meant to be consistent with the employer's answer to

> Grievance No. 32-99. For example, if an officer becomes pregnant and her doctor requires her to be on modified duty, the employer will place the officer on modified duty elsewhere in the County at no loss of compensation until the Officer requests a leave of absence due to her condition.

The PBA's proposal refers to a grievance filed in May 1999 on behalf of a pregnant correction officer. The grievance states that the officer had been on modified duty for two months when she was ordered to make a choice of returning to full duty or taking a leave of absence. The grievance alleged that it had been a long-standing practice to allow pregnant officers to work modified duty.

On August 18, 1999, the County responded to the grievance. The County states:

> We have reviewed the grievance filed by PBA Local No. 199 on behalf of Correction Officer Terry R. Kearns-Brunson concerning her leave of absence. As I advised PBA State Delegate Peter Fernia yesterday, although there is no light duty available in the Division of Correctional Services, the County may be able to place Ms. Kearns-Brunson in a modified duty position elsewhere in the County. However, in order to assess Ms. Kearns-Brunson's limitations, we are requesting that she have the enclosed medical certification completed in full by her treating physician. I also am enclosing a copy of her job description to assist her physician in completing the medical certification.

The County states that the grievant was never placed in a modified or light duty position elsewhere in the County.

In Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78 (1981), our Supreme Court outlined the steps of a scope of

negotiations analysis for police officers and firefighters.[2/]

The Court stated:

> First, it must be determined whether the particular item in dispute is controlled by a specific statute or regulation. If it is, the parties may not include any inconsistent term in their agreement. [State v. State Supervisory Employees Ass'n, 78 N.J. 54, 81 (1978).] If an item is not mandated by statute or regulation but is within the general discretionary powers of a public employer, the next step is to determine whether it is a term and condition of employment as we have defined that phrase. An item that intimately and directly affects the work and welfare of police and fire fighters, like any other public employees, and on which negotiated agreement would not significantly interfere with the exercise of inherent or express management prerogatives is mandatorily negotiable. In a case involving police and fire fighters, if an item is not mandatorily negotiable, one last determination must be made. If it places substantial limitations on government's policymaking powers, the item must always remain within managerial prerogatives and cannot be bargained away. However, if these governmental powers remain essentially unfettered by agreement on that item, then it is permissively negotiable.
> [Id. at 92-93; citations omitted]

We consider only whether the proposal is mandatorily negotiable. It is our policy not to decide whether contract proposals, as opposed to contract grievances, concerning police and fire department employees are permissively negotiable since the employer has no obligation to negotiate over such proposals or to consent to their submission to interest arbitration. Town of West New York, P.E.R.C. No. 82-34, 7 NJPER 594 (¶12265 1981).

The County asserts that the decision to create a light duty policy is a non-negotiable managerial prerogative. The County further states that there is no light duty policy applicable to correction officers and thus there are no positions to offer. The County has provided a copy of the light duty policy for its other departments and divisions and states that it applies only to employees with work-related injuries.

The PBA states that its proposal does not seek to have the County create a light duty policy. The PBA asserts that the County has established modified duty assignments for County employees. The PBA further asserts that the allocation of modified duty assignments is a mandatorily negotiable subject. It contends that the County is seeking to repudiate an agreement and is therefore negotiating in bad faith. Finally, the PBA asserts that the Americans With Disabilities Act (ADA) requires municipal entities to accommodate employees with disabilities. It contends that extending reasonable accommodations to some employees and not to pregnant employees violates the Federal Pregnancy Anti-Discrimination Act, 42 U.S.C. §2002 (PDA), as well as the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq. (LAD).

An employer generally has the non-negotiable discretion to determine whether it wishes to maintain a "light duty" or "modified duty" policy. We have therefore restrained arbitration of grievances demanding that an employer create light duty assignments. South Brunswick Tp., P.E.R.C. No. 2001-35, 27 NJPER

40 (¶32021 2000); City of Camden, P.E.R.C. No. 93-3, 18 NJPER 392 (¶23177 1992); Montgomery Tp., P.E.R.C. No. 89-22, 14 NJPER 574 (¶19242 1988); City of Camden, P.E.R.C. No. 83-128, 9 NJPER 220 (¶14104 1983). But we have also declined to restrain arbitration of grievances asserting that employees were denied available light duty assignments for which they were qualified. City of Englewood, P.E.R.C. No. 94-114, 20 NJPER 257 (¶25128 1994); City of Englewood, P.E.R.C. No. 93-110, 19 NJPER 276 (¶24140 1993). Such claims are at least permissively negotiable. In cases where a light duty policy exists, we have allowed arbitration of disputes where the employer asserted that no position then existed, or that such positions were not available to officers injured off-duty as opposed to on-duty. See Borough of Belmar, P.E.R.C. No. 2000-4, 25 NJPER 367 (¶30158 1999); Ewing Tp., P.E.R.C. No. 97-9, 22 NJPER 283 (¶27153 1996); Franklin Tp., P.E.R.C. No. 95-105, 21 NJPER 225 (¶26143 1995).

The PBA's proposal is not mandatorily negotiable. On its face, it requires the County to provide light or modified duty for pregnant officers, even if light duty is not provided to other correction officers. Contrast Borough of River Edge, P.E.R.C. No. 94-66, 20 NJPER 56 (¶25020 1993) (employer's light duty policy may be included in agreement for notice purposes). A claim that the County's policy is discriminatory under the ADA, PDA or LAD does not transform the decision to provide light duty into a mandatorily negotiable subject. Teaneck Bd. of Ed. v. Teaneck Teachers Ass'n, 94 N.J. 9 (1983).

ORDER

Proposal No. 12 is not mandatorily negotiable.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, McGlynn, Muscato, Ricci and Sandman voted in favor of this decision. Commissioner Madonna abstained from consideration. None opposed.

DATED: July 26, 2001
Trenton, New Jersey
ISSUED: July 27, 2001